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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

DOCKET No. 1017

AMTORG TRADING CORPORATION, a corporation, VSESOJUZNOJE OBJEDINENIJE "STANKOIMPORT" (All-Union Combine "Stankoimport"), VSESOJUZNOJE OBJEDINENIJE "MACHINOIMPORT" (All-Union Combine "Machinoimport"), VSESOJUZNOJE OBJEDINENIJE "TECHNOPROMIMPORT" (All-Union Combine "Technopromimport"), VSESOJUZNOJE OBJEDINENIJE "RAZNOIMPORT" (All-Union Combine "Raznoimport"), and VSESOJUZNOJE OBJEDINENIJE "PROMSYRIOIMPORT" (All-Union Combine "Promsyrioimport"),

Petitioners-(Libelants-Appellees),

against

AMERICAN FOREIGN STEAMSHIP CORPORATION, a corporation, Claimant of the American Steamship WILDWOOD, Official No. 219356, her engines, boilers, tackle, apparel, furniture and consumable stores, and NATIONAL SURETY CORPORATION, a corporation,

Respondents-(Respondents-Appellants).

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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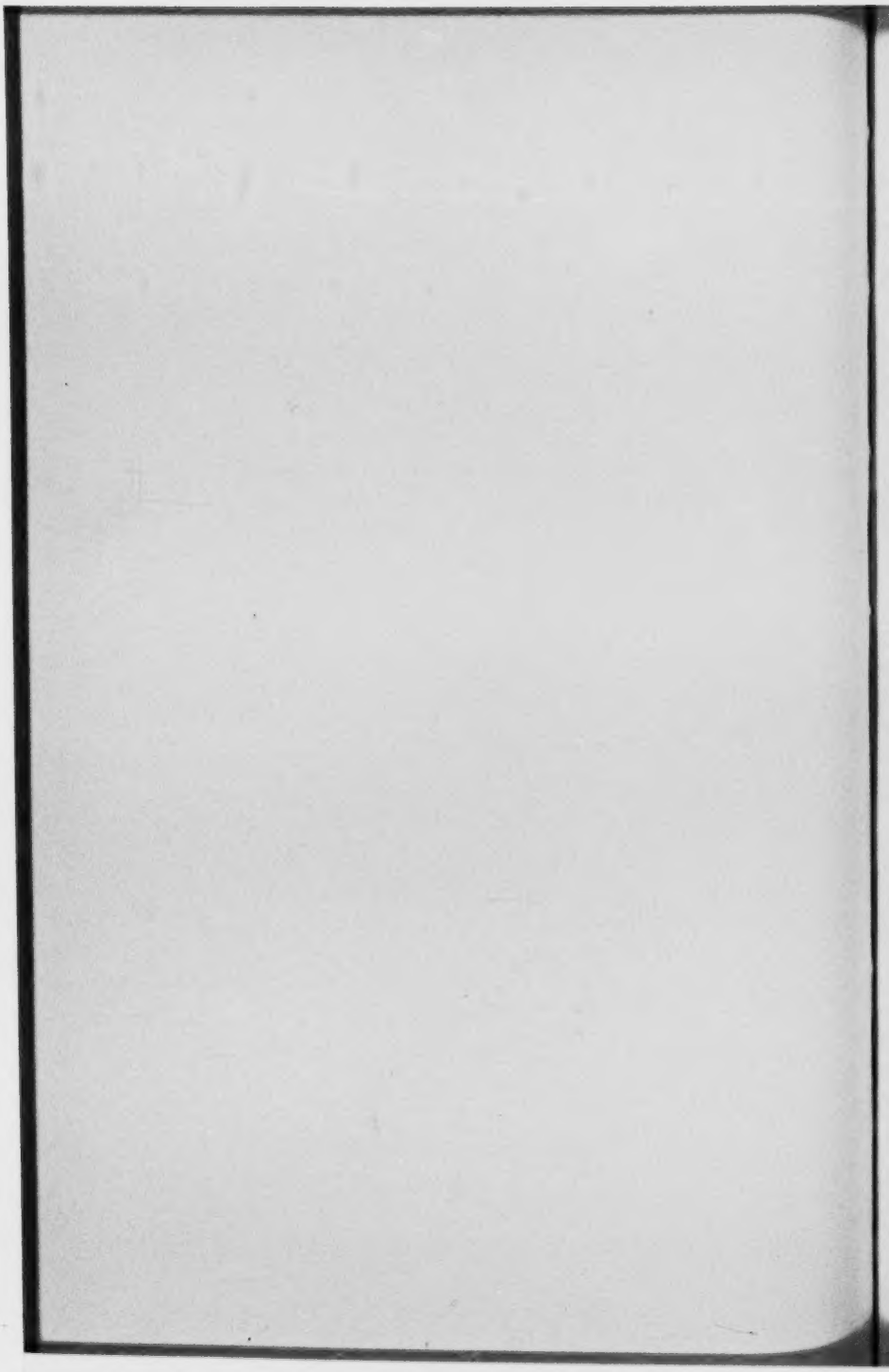

INDEX

PAGE

The Facts 2

POINT I—No substantial question of law is here presented, but solely questions of fact, which afford no ground for review by certiorari 6

POINT II—The contention that certiorari should be granted on the ground that Clause 4 of the Bill of Lading herein is invalid under the provisions of the Harter Act and the Carriage of Goods by Sea Act, is without merit 11

POINT III—No conflict between decisions of the Ninth and Second Circuits as to the scope of review of questions of fact is involved in the present case 14

CITATIONS:

Adams *v.* Mills, 286 U. S. 397 11

Atlantic Fruit Co. *v.* Solari, 238 Fed. 217 ..... 7, 10

Blair *v.* Oesterlin Co., 275 U. S. 220 11

The Blandon, 287 Fed. 722 9

Burnet *v.* Commonwealth Improvement Co. 287 U. S. 415 11

Duignan *v.* United States, 274 U. S. 195 11

Essex *v.* Langbehn, 250 Fed. 98 8

General Talking Pictures Corporation *v.* Western Electric Co., 304 U. S. 175 6

George J. Goulandris, The, 36 F. Supp. 827 7

W. R. Grace & Co. *v.* Toyo Kisen Fabushika Kaisha, 7 F. (2d) 889; *aff'd*, 12 F. (2d) 519; *cert. den.*, 273 U. S. 717 13

Himmel Bros. *v.* Serrick, Corp., 122 F. (2d) 740 16

PAGE

Hindanger, The, 76 F. (2d) 13 13

Israel *v.* Luckenbach S. S. Co., 6 F. (2d) 996 ..... 9, 13

Kronprinzessin Cecilie, The, 244 U. S. 12 ..... 7, 8

Kuhn *v.* Princess Lida of Thurn & Taxis, 119 F. (2d) 704 16

Luckenbach S. S. Co. *v.* W. R. Grace & Co., 267 Fed. 676; *cert. den.*, 254 U. S 644 13

Minnich *v.* Gardner, 292 U. S. 48 11

N. Y. Dock Co. *v.* S. S. Poznan, 274 U. S. 117 11

Nobel's Explosives Co. *v.* Jenkins [1896] 2 Q. B. 326, 8 Aspinall (N. S.) 181 7

Petterson's Lighterage & Towing Corp. *v.* N. Y. Central Railroad Company, 126 F. (2d) 992 ..... 14, 15, 17

Quina Export Co. *v.* Seebold, 287 Fed. 626 9

The San Giuseppe, 122 F. (2d) 579 8

Smith *v.* U. S. Shipping Board E. F. Corp., 2 F. (2d) 390; 26 F. (2d) 337; *cert. den.*, 273 U. S. 747 13

Southern Power Company *v.* North Carolina Public Service Commission, 263 U. S. 508 6

Styria, The, *v.* Morgan, 186 U. S. 1 ..... 5, 7, 8

Tatsuuma Kisen Kabushiki Kaisha *v.* Robert Dollar Co., 31 F. (2d) 401 7

United States *v.* Mitchell, 104 F. (2d) 343 16

STATUTES:

Carriage of Goods by Sea Act (1936), 46 U. S. C. A. sec. 1303 ..... 11, 13, 14

Harter Act (1893), 46 U. S. C. A. secs. 190, 191 ..... 11, 12

MISCELLANEOUS:

U. S. Dept. of State Bulletin, Vol. 2, p. 320 5

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The question before the Circuit Court of Appeals was whether the respondent shipowner was justified under the particular circumstances of the case in ordering its vessel to return to the United States to avoid the threat of seizure.

Respondents appealed to the Circuit Court of Appeals for the Ninth Circuit from an adverse decree by the District Court for the Western District of Washington, Northern Division. The Circuit Court of Appeals reversed upon what it held to be clearly erroneous findings of the facts by the District Court. The appellate court stated that it was unable to accept the determination of the court below "because this finding is in a large part based upon another finding of a major probative fact in determining the extent of the hazard contemplated by the Carrier and Shipper on March 18th, which latter finding has no support whatsoever in the evidence" (Rec., p. 2138). The Circuit Court found this error had been made in four places, twice in the District Judge's opinion and twice in his findings of fact (Rec., p. 2138).

The Facts

Hereafter the word "respondent" will be used to refer to American Foreign Steamship Corporation.

Respondent's S. S. "Wildwood" loaded a cargo of several thousand tons of copper and also large quantities of brass, steel sheets and airplane parts and accessories at Jersey City on February 14-19, 1940, for carriage to Vladivostok (Rec., pp. 163-164, 812, 815, 1051-1071). The cargo was shipped by Amtorg Trading Corporation and consigned to the various All-Union Combines which were also parties libelant. Contrary to the usual case, the form of bill of lading issued was not furnished by the carrier, but was supplied by Messrs. Moore-McCormack, who for nine years have been the agent of the shipper (Rec., pp. 713, 714, 718, 724-726, 1374-1378). Clause 4 thereof provided that

> "In any situation whatsoever or wheresoever occurring * * * which in the judgment of the carrier or master is likely to give rise to capture, seizure, detention, damage, delay or disadvantage to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to proceed on or continue the voyage or to enter or discharge

> the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge * * *"

the master may

> "proceed or return, directly or indirectly, to or stop at such other port or place whatsoever as he or the carrier may consider safe or advisable under the circumstances * * *."

The "Wildwood" sailed February 19, 1940, and after traversing the Panama Canal, proceeded toward Honolulu. On March 18, 1940, while the vessel was en route to Honolulu, libelant requested that the destination of the "Wildwood" be changed from Vladivostok to Petropavlovsk, Kamchatka, with the option (subsequently exercised, Rec., p. 396) of Vladivostok as a second port of call. Libelant requested this change of destination to be kept secret and that any revised insurance necessary be placed with United States rather than British underwriters (Rec., p. 1412).

After being assured by Amtorg's representative that the Port of Petropavlovsk was a safe and proper port (Rec., p. 1415), the change of destination was agreed upon on March 18, 1940, and confirmed in writing on March 23, 1940. The master was thereupon instructed to proceed to Petropavlovsk (Rec., p. 980, Ex. A-36).

The master and several of the officers heard radio reports from Saigon and Australia of the seizure by British naval forces of a Russian vessel, the "Mayakovsky", carrying the same type of cargo as the "Wildwood' and en route to Vladivostok (Rec., pp. 743, 744, 989, 1091, 1151, 1154). On March 27, 1940, the leading New York evening newspapers (New York Evening Sun, Post and World-Telegram) and Lowell Thomas and Elmer Davis and other radio commentators too numerous to mention reported the seizure of the Russian vessel "Mayakovsky", herself a neutral vessel bound to a neutral port (Rec., pp. 1221-1224, 1266, 1275), and most of these reports also mentioned the Russian vessel "Selenga" as having been detained by the

British for a period of two and one-half months. Almost all the comments indicated that Britain's avowed purpose was to prevent any possible leakage of copper and other metals to Germany via Russian Siberian ports (Rec., pp. 658, 670, Ex. A-1, A-3). The "Mayakovsky", under charter to Amtorg, had been seized on March 15, 1940, just three days before the change of destination was requested.

On the morning of March 28, 1940, the seizure of the "Mayakovsky" was mentioned in the New York Times, Herald Tribune and Journal of Commerce. The comments also interpreted these events as an extension of the British blockade to Russian Pacific ports (Rec., pp. 673, 676, 681, Exs. A-4, A-5, A-6).

On the morning of March 28th, Amtorg's representative went to respondent's office in response to a telephone call which stated the urgency of the situation which had arisen, and when asked why the ship had been ordered to Petropavlovsk, stated it was safer "to go further north than to go to Vladivostok on account of this blockade" (Rec., p. 1464).

Respondent's inquiries at the British and Russian Embassies and the State Department elicited no denial of the existence of the blockade (Rec., pp. 1301, 1314, 1315, 1317).

Respondent, after unsuccessfully asking for an indemnity against seizure, stated it could not further expose the "Wildwood" to seizure, capture or prolonged detention and ordered her return to the United States. It refused to have what it intended as a commercial venture turned into an attempt to run the British blockade.

It developed during the trial that the "Mayakovsky", which was then under charter to petitioner (Rec., p. 1988), had been seized March 15, 1940, three days before the request was made for a change of destination, en route from Petropavlovsk to Vladivostok, the precise route on which the "Wildwood" was requested to proceed.

The petition herein, and petitioners' brief, contain certain misstatements of the facts, which will be pointed out *infra*, and misstate, on certain points, the holding of the Circuit Court of Appeals below. It is, therefore, respect-

fully urged that this court carefully scrutinize the opinion of the Circuit Court of Appeals below, with this fact in mind.

There is no support whatsoever in the record for the statement on page 5 of the petition herein that "the master abandoned the voyage supposing he had been ordered to do so because of ice conditions at Petropavlovsk". No reference to the record is cited in support of this and it is not in fact true. The fact is that, while the master acted on the owner's orders, as in *The Styria* v. *Morgan* (186 U. S. 1, 19, 20), he did so in entire agreement therewith and in conformity with his own independent judgment as to the risk of seizure, as well (Rec., pp. 279-280; 989. See also p. 113 of original deposition of Captain Arntz).

Various further subsidiary questions of fact are raised by the petitioners which we shall here consider briefly, although as will appear, differences on such matters of fact afford no basis for the granting of the writ herein. Thus, on page 6, the petition suggests there never was a threat to United States vessels. However, the threat related to seizure of cargoes of metals and made no distinction as to the bottoms in which they were carried. None of the reports upon which respondent acted contained the suggestion of any such distinction, and the British Foreign Secretary, on March 27, 1940, expressly declared that no distinction was being made between Russian ships and ships of "all other neutrals" (N. Y. Times, March 28, 1940; Ex. 56, Rec. pp. 678-679). It would have been an extraordinary blockade, indeed, which contemplated permitting the passage of cargoes of metals if carried in American bottoms. The British Government did not hesitate to seize American vessels in other war areas. In fact, no less than 108 United States vessels had been seized in the Atlantic and Mediterranean by Great Britain between September 1, 1939, and March 15, 1940 (U. S. Dept. of State Bulletin, Vol. 2, p. 320).

Similarly, on page 7 of the petition, it is stated that the British blockade of Germany had been announced on September 5, 1939. This statement seeks to convey the impression that the blockade of Russian Pacific ports existed

almost from the outbreak of the war. However, on February 27, 1940, Ronald Cross, the British Minister for Economic Warfare, announced emphatically "there was no control in the Pacific" (Ex. 72, not printed, Journal of Commerce, Feb. 28, 1940).

Similarly, the petitioners refer (p. 4) to the interception by the British for "contraband inspection" of the Russian vessel "Selenga" on January 14, 1940. The seizure of this vessel, however, was merely an isolated incident arising from a special cause, and the presence on board of German-owned materials, and in no way involved any danger to a ship in the situation of the "Wildwood", as will be seen from the very full discussion of this incident in the opinion of the Circuit Court below (Rec., pp. 2141-2143).

POINT I

No substantial question of law is here presented, but solely questions of fact, which afford no ground for review by certiorari.

It is well settled that where the question involved is primarily one of fact, there is no basis for granting the petition (*Southern Power Company* v. *North Carolina Public Service Commission* (1923), 263 U. S. 508). As the court said, in *General Talking Pictures Corporation* v. *Western Electric Co.* (1938), 304 U. S. 175, at page 178:

> "Granting of the writ would not be warranted merely to review the evidence or the inferences drawn from it."

In the present case, no substantial question is presented except such issues of fact. There has been substantial agreement between both the District Court, the Circuit Court, and counsel for both petitioners and respondent as to the proper test of respondent's liability. This is, in brief, that respondent was justified in turning back the "Wildwood" if the Carrier had reasonable grounds for apprehending a serious danger, substantially greater than

had theretofore existed. Thus, the District Court laid down as its guiding rule: "The claimant cannot justify frustrating the voyage agreement because threatened blockade of Vladivostok by the belligerent unless there were increased hazards to shipping than existed at the inception of the voyage to such a degree as would move reasonably prudent men" (Rec., p. 149). The petitioners (appellees below) similarly declared in their brief (p. 34): "It is incumbent upon appellant (respondent here) to show not only that there were changed conditions, but that such changed conditions were such as to create a reasonable belief that if the voyage were not abandoned the vessel and cargo were in imminent peril of loss or damage." Similarly, the Circuit Court below rested its decision upon the existence of a "reasonable apprehension of a real danger of seizure", constituting "a far greater war hazard" (Rec., p. 2148). And with these views, respondent has been throughout in agreement.

The decision of the Circuit Court herein and the governing rule adverted to above are based both upon the general maritime law and upon Clause 4 of the bill of lading herein (*supra*, pp. 2-3). The petitioners' brief, however, questions whether the doctrine of the *Kronprinzessin Cecilie* and *The Styria* cases applies to the situation in the present case. The argument apparently is that the doctrine of these cases only applies where war has broken out, and where the vessel is proceeding to a belligerent port. This position, however, is without support in the cases cited. The doctrine was not based upon the existence or the nonexistence of war, but upon the existence of changed conditions involving substantially increased hazard. The problem remains the same whether shipment is through a neutral country or direct to a belligerent port, or whether war had already broken out or not when the vessel sailed (*The Kronprinzessin Cecilie*, 244 U. S. 12; *The Styria* v. *Morgan*, 186 U. S. 1; *Nobel's Explosives Co.* v. *Jenkins* [1896] 2 Q. B. 326, 8 Aspinall (N. S.) 181; *Tatsuuma Kisen Kabushiki Kaisha* v. *Robert Dollar Co.*, 31 F. (2d) 401, 403; *The George J. Goulandris*, 36 F. Supp. 827; *Atlantic Fruit Co.* v. *Solari*,

238 Fed. 217; *The San Giuseppe,* 122 F. (2d) 579, 586; *Essex* v. *Langbehn,* 250 Fed. 98). In the present case, the institution of contraband control in the Pacific by the British and the seizure of the "Mayakovsky" on the very voyage which the petitioners maintain the shipowner should have pursued, brought respondent squarely within these rules.

Petitioners contend (p. 13) that the master must participate in the decision to return and the owner alone possesses no discretion to order the vessel's return. This has no support in the decisions. Two citations are sufficient. In *The Styria,* the master testified flatly that "he acted under instructions" (186 U. S. at pp. 19, 20). In *The Kronprinzessin Cecilie,* the view that the master must participate in the decision was adopted by the Circuit Court (238 Fed. 668) but repudiated by the Supreme Court (244 U. S. 12). In that case, the master ordered the return of the vessel within nine minutes after receiving the owner's instructions (238 Fed. at p. 671). In both cases, the shipowner and vessel were excused. Historically, the only reason for vesting the discretion in the master was that before the improved modern systems of communication he was out of touch with the owners from the moment his vessel sailed beyond the horizon.

Finally, petitioners argue that, in any event, the Carrier should have proceeded to Petropavlovsk (Pet., p. 14; Pet. Br., Point II), as an alternative still open without hazard to the Carrier. This argument is postulated upon the assumption that no substantial risk attended the progress of the "Wildwood" to Petropavlovsk, and petitioners assert that no finding has been made by the Circuit Court on this point. The assumption that there was no risk, and the assertion that there was no finding, are both contrary to fact. The various reports upon which the Carrier relied referred to blockade or "contraband control", not only of Vladivostok, but of "*Russian-Siberian* ports", and the Circuit Court specifically so states (Rec., p. 2147). Furthermore, the Circuit Court likewise specifically declared that, under the circumstances, "no conclusion could reasonably be reached by the Carrier or any other person

similarly placed, save that the *further progress of the Wildwood* * * * *toward* its ports of destination was fraught with serious risk" (Rec., p. 2147). If it "could not *proceed* * * * *toward* its *ports* of destination" without "serious risk", it is obvious that the ship had, at that time, already reached a zone of serious danger, irrespective of whether it completed the voyage to Vladivostok, or attempted to reach Petropavlovsk unmolested. Finally, the Circuit Court specifically declared (Rec., p. 2148) that "We held that * * * the carrier had a reasonable apprehension of a real danger of the seizure of the Wildwood by the British naval vessels on her voyage to Vladivostok *via Petropavlovsk*", and that "the danger so reasonably apprehended was a *far greater* war hazard" than had hitherto existed.

While this court does not sit to review questions of fact, as stated, or grant certiorari upon such grounds, it may be pointed out that the Circuit Court was clearly correct in these specific findings. The "Wildwood's" course was no secret from the British, for London insurance agents had been notified a week previously of the deviation to Petropavlovsk (Rec., pp. 1550-1552), and the cables between the master and the owner had been sent *en clair* (Rec., pp. 978-980, 991, 994). It thus appears that if the British wished to seize the vessel, they could as readily intercept her en route to Petropavlovsk as to Vladivostok.

It is apparent from the foregoing that the only substantial questions raised by the petition involve disagreements with respect to subsidiary questions of fact, and that no controversy as to the basic test to be applied and the dominating rule of law here involved is necessary to the decision of this case. The undisputed rule is, to repeat, that respondent was entitled to return the "Wildwood", if confronted with a reasonable apprehension of a real danger, substantially greater than had existed when the obligation was assumed. This test is likewise the governing consideration in the construction and application of Clause 4 of the bill of lading, with the broad powers therein conferred (*Cf. Quina Export Co.* v. *Seebold* (C. C. A. 5th), 287 Fed. 626; *The Blandon,* 287 Fed. 722, 727; *Israel* vs. *Luckenbach*

S. S. Co., 6 F. (2) 996; *Atlantic Fruit Co.* v. *Solari*, 238 Fed. 217); and this is the test which has been applied by the Circuit Court of Appeals below. There is no basis whatsoever for the suggestion in petitioners' brief (p. 27) that the Circuit Court of Appeals, in its decision, "goes to the length of holding that *any appreciable or imaginary aggravation of risk* occurring during the course of a voyage justifies its abandonment." The Carrier here was not confronted with merely an imaginary aggravation of risk. As the Circuit Court of Appeals specifically held (Rec., p. 2147), these reports "were not mere fanciful and unfounded rumors, but the natural and world-wide interpretation of admitted facts by persons who were experts on foreign affairs. It would have been foolhardy for the Carrier to set up its judgment in opposition to facts stated by the press and the most experienced radio and news commentators of the day who appear to have been convinced that the seizure of the *Mayakovsky* meant 'blockade' or strict contraband control of Russian Siberian ports." Indeed, the United States Department of State itself, through Secretary Hull and Under Secretary Welles, were reported as in sympathy and cooperating with this newly instituted British policy of blockade or "contraband control" in the Pacific (Resp. Ex. A-73, not printed). The Circuit Court of Appeals specifically based its decision, as already stated, on the ground that "no conclusion could reasonably be reached by Carrier, or any other person similarly placed, save that the further progress of the Wildwood with its cargo of metals, similar to those on the seized vessel, towards its ports of destination, was fraught with *serious risk*"; and that "the Carrier had a *reasonable apprehension of a real danger* of the seizure of the Wildwood by the British naval vessels on a voyage to Vladivostok *via Petropavlovsk*"; and that this danger was "a far greater war hazard" than that theretofore existing (Rec., pp. 2147, 2148, ital. ours). It is understandable enough that petitioners should disagree with these conclusions; but no amount of disagreement can change the nature of the test adopted and applied by the Circuit Court, or convert the question of fact therein involved into one of law.

POINT II

The contention that certiorari should be granted on the ground that Clause 4 of the Bill of Lading herein is invalid under the provisions of the Harter Act and the Carriage of Goods by Sea Act, is without merit.

In an attempt to escape from the effect of Clause 4 of the Bill of Lading herein, which, in itself, furnishes complete authority for the action of the Carrier and the decision of the Circuit Court, petitioners suggest that this clause is invalid under the Harter Act and the Carriage of Goods by Sea Act (Pet. Br., pp. 15, 16, 33-34). It is apparent that this suggestion is merely an attempt, without substance, to bolster up the request for certiorari. No such claim of invalidity under the Carriage of Goods by Sea Act, or the Harter Act, was raised, or even hinted at, by petitioners, at the trial of this case, or in the briefs or argument before the Circuit Court. Nor was there the slightest intimation of any such question in the case in the opinion of the District Court, or of the Circuit Court, or in any of the pleadings. Even petitioners' present brief avoids squarely asserting or adopting such an unfounded view, and merely "raises the question", in a tentative and ambiguous manner.

It is well settled that this court will not, save in very exceptional circumstances, here review questions that were not raised below. As the court declared (per STONE, *J.*) in *Duignan* v. *United States* (274 U. S. 195, 200): "This court sits as a court of review. It is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed" (citing many cases; see, to same effect, *Blair* v. *Oesterlin Co.*, 275 U. S. 220, 225; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418; *N. Y. Dock Co.* v. *S. S. Poznan*, 274 U. S. 117, 123; *Adams* v *Mills*, 286 U. S. 397; *Minnich* v. *Gardner*, 292 U. S. 48).

In the present case, there are no "exceptional circumstances", or sudden emergencies, whatsoever that call for the abandonment of the above rule and the elimination of a considered judgment upon the issue by the court below. On the contrary, the suggestion of invalidity of Clause 4 rests upon statutory language enacted in 1893, which has been construed and applied in innumerable cases for over half a century, without the validity of clauses of this nature in the bill of lading ever being successfully questioned on the grounds now so belatedly sought to be injected into this case. No one, in all that time, ever supposed the statute had the meaning or effect that petitioners, after half a century, now suggest, although clauses of the same nature as Clause 4 herein have been repeatedly before the courts.

Moreover, the suggestion of invalidity, raised after half a century of active contrary interpretation, is patently without substance on the merits. The suggestion is, that the Harter Act (enacted in 1893) makes null and void any provision in the bill of lading which relieves the owner from liability for "proper delivery" of the cargo (46 U. S. C. A., secs. 190, 191); and that, for this reason, Clause 4, conferring authority on the Carrier to discontinue the voyage when a situation arises likely to give rise to capture, seizure, detention, damage, delay, etc., is, or may be, void. The mere general requirement, however, that the Carrier may not contract away the obligation to "properly deliver" the cargo, does not in any way conflict with such a clause. The phrase "proper delivery" obviously did not impose an iron-clad obligation to attempt completion of the voyage, irrespective of whatever dangers might arise, but left ample scope for reasonable contractual provisions with respect thereto. What is, or is not, "proper" must depend upon the circumstances and the agreement of the parties. Were this not so, practically all of the bills of lading issued since 1893 would have to be adjudged to have been invalid, for some clause of this nature has been in almost universal use. Numerous cases have likewise sustained so-called "liberty to call" clauses, conferring latitude as to the course of the vessel within the limits of "inherent rea-

sonableness'' (*The Hindanger,* 76 F. (2d) 13, 17; and cases there cited); and it was expressly held that such contractual provisions, if reasonable, were not in conflict with the Harter Act. In case after case, moreover, this court has refused certiorari to review such holdings.

W. R. Grace & Co. v. *Toyo Kisen Fabushika Kaisha* (D. C. Cal., 1925), 7 F. (2d) 889; *aff'd,* 12 F. (2d) 519; *cert. den.,* 273 U. S. 717;

Smith v. *U. S. Shipping Board E. F. Corp.* (D. C., N. Y., 1924), 2 F. (2d) 390; *mod. on another point,* 26 F. (2d) 337; *cert. den.,* 273 U. S. 747;

Israel v. *Luckenbach S. S. Co.* (C. C. A. 2, 1925), 6 F. (2d) 996; *cert. den.,* 268 U. S. 691;

Luckenbach S. S. Co. v. *W. R. Grace & Co.* (C. C. A. 4, 1920), 267 Fed. 676; *cert. den.,* 254 U. S. 644.

In the instant case, the Circuit Court of Appeals has pointed out that both parties agree that the discretion conferred upon the Carrier by Clause 4 of the bill of lading may not be exercised in an arbitrary and unreasonable manner. The Carrier has not and does not now contend otherwise.

The facts amply sustain the holding of the Circuit Court of Appeals that the act of the ship in returning to this country was, under the circumstances, reasonable. This court should not now consider the question of whether this clause of the bill of lading would permit the ship to act unreasonably. On this record, such a question would be entirely academic. The Carrier, as the Circuit Court has declared, did not order the vessel to return until a situation arose where ''no conclusion could reasonably be reached by the Carrier, or any other persons similarly placed, save that further progress of the Wildwood * * * towards its ports of destination, was fraught with serious risk'' (Rec., p. 2147). Under such circumstances, reference to the statutory duty of ''proper delivery'' is idle and trivial.

The Carriage of Goods by Sea Act (1936) likewise provides (46 U. S. C. A., sec. 1303) that any clause ''reliev-

ing the carrier or the ship from liability for loss or damage * * * arising from * * * *failure in the duties and obligations provided in this section* or lessening such liability", shall be null and void; but the only "duty and obligation", provided in the section, here relevant, is that "the carrier shall properly * * * carry * * * and discharge * * * the goods carried". This obligation, to "properly discharge" the goods carried, is, it will be seen, merely a restatement, in almost identical terms, of the general obligation of "proper delivery" contained in the Harter Act, considered above, and raises no new question.

No reason exists, after fifty years of universal contrary practical construction, why certiorari should be granted on any such pretended conflict between clause 4 and the statutes in question.

POINT III

No conflict between decisions of the Ninth and Second Circuits as to the scope of review of questions of fact is involved in the present case.

Petitioners' brief (p. 35, ff.) conjures up a conflict of opinion between the Ninth Circuit and the Second Circuit with respect to the nature of an admiralty appeal, the Ninth Circuit taking the view that such an appeal is a trial *de novo,* whereas, in the Second Circuit this view has been dissented from (*Petterson's Lighterage & Towing Corp.* v. *N. Y. Central Railroad Company,* 126 F. (2d) 992). Whether the view of the Ninth Circuit be adopted or whether the views of Judge HAND in the *Petterson* case, *supra,* be followed is, however, quite immaterial as, under either doctrine, the Circuit Court below clearly had power in the instant case to make the determination here sought to be reviewed. For it is well settled, and clearly recognized in the *Petterson* case itself that, wholly aside from the ques-

tion of trial *de novo* in admiralty cases, the Circuit Court of Appeals is empowered to reverse findings which are "clearly erroneous", which exhibit "manifest error", or which are clearly against the preponderance of the evidence.

In the present case, the Circuit Court below, although according "respect to the findings of the district court" (Rec., p. 2138), based its decision upon the ground that the fundamental findings of fact by the District Court were wholly erroneous and, as to various basic and crucial questions, had "no support whatsoever in the evidence" (Rec., p. 2138). The whole issue in the case rested upon the question whether there was a reasonable apprehension of substantially increased hazard, at the time the "Wildwood" turned back. In this connection, the trial court held: (1) that prior to the date of turning back, the respondent already had notice and contemplated an existing blockade; and (2) that the events of March 27-28, 1940 (surrounding the seizure of the "Mayakovsky") resulted in no increase in hazard. The Circuit Court of Appeals, however, found itself utterly "unable to accept the court's finding" in these connections (Rec., p. 2138). As to the finding that, even prior to the time of turning back, respondent already had notice of the blockade, the Circuit Court declared that this finding "has *no support whatsoever* in the evidence" (Rec., p. 2138), and that "*there is no evidence* that the parties contemplated an existing blockade of that port at any time prior to the abandonment of the voyage" (Rec., p. 2139). The error of the trial court, it pointed out, was due to the fact that "in four places, two in his opinion and two in his findings of fact, the venerable District Judge * * * mistook a later conversation concerning a blockade of Vladivostok, occurring on March 28th, after the Carrier learned on the day before of the seizure of the Mayakovsky, as having occurred ten days earlier, on March 18th * * *" (Rec., pp. 2138-2139).

As the Circuit Court further pointed out, this wholly erroneous and completely unfounded belief of the District Court concerned "a major probative fact, in determining

the extent of the hazard contemplated by the carrier and shipper", and "An error so grave is such a patent factor in the District Court's decision, that we cannot say that the decision would have been made for the *shipper* if the court had realized that there was no evidence that the *carrier* had agreed to carry to a blockaded port" (Rec., pp. 2138, 2139).

As to the basic finding of the trial court that there was "no increased hazard" (Rec., pp. 150, 204), the conclusion of the Circuit Court of Appeals was, in effect, that this was clearly contrary to the evidence. As the Circuit Court declared (Rec., p. 2147): "Under these circumstances *no conclusion could reasonably be reached by Carrier, or any other persons similarly placed,* save that the further progress of the Wildwood, with its cargo of metals, similar to those on the seized vessel, towards its ports of destination, was fraught with serious risk." The above language, that no other conclusion could reasonably be reached under the evidence, clearly brings the case within the well-established rule, irrespective of any question of trial *de novo.*

Moreover, it should be noted that the findings in the present case, which were disaffirmed, were largely based upon the court's view of undisputed documentary evidence, such as newspaper reports and the like, and radio news broadcasts, as to which there is no question of credibility, and upon depositions. It is well settled, and impliedly recognized by Judge HAND himself in the *Petterson* case, *supra,* (at pages 994, 996) that under such circumstances the findings of the trial court stand upon a different footing; inasmuch as the court below was in no better position to judge of the effect of such testimony than the Circuit Court, they are of only slight weight upon appeal (*United States* v. *Mitchell,* 104 F. (2d) 343, 346; *Kuhn* v. *Princess Lida of Thurn & Taxis,* 119 F. (2d) 704, 706; *Himmel Bros.* v. *Serrick Corp.,* 122 F. (2d) 740).

The above considerations dispose likewise of the minor question of cargo damage in the present case. The issue on this branch of the case was solely one of fact, *i. e.,* whether the water entered the hold through the hatches or through

the chain locker, and the Circuit Court rested its decision in this respect squarely upon the ground that the uncontradicted evidence was contrary to the finding of the trial court (Rec., pp. 2149-2150).

It thus appears that if the decision below were to be governed by the rule of the *Petterson* case, the court would not have arrived at a different conclusion, since its reversal was based on the clearly erroneous findings of fact of the District Court. Consequently, even if there were a conflict between the Circuit Courts of Appeal for the Second and Ninth Circuits—a question which it is not necessary here to decide—a review of this case would not resolve that conflict.

The petition for a writ of certiorari should accordingly be denied.

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